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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-418

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York, FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital, and ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center,

Petitioners,

—against—

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion below of the United States Court of Appeals for the Second Circuit is now reported at 446 F.2d 65 (1971).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions of petitioners Miller and O'Neill (the "State Petition") and of petitioner Thomas (the "City Petition").

Questions Presented

1. Can mental hospitals, acting without judicial authorization, administer non-emergency medications to a Christian Scientist who objects to such treatment on religious grounds?

2. Should this court consider the applicability of the *respondeat superior* doctrine to the facts of this case when that question was not raised, briefed or argued in either of the courts below, and when the resolution of that question may be unnecessary to the disposition of this case?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the petitions.

Statement of the Case

Respondent is a 59 year old Christian Scientist. She has never been convicted or charged with any crime or violent behavior. She has never been found to be mentally ill or mentally incompetent by any court or judge, and except for the incidents at issue, she has never been hospitalized or treated for mental illness. Respondent lived alone, on welfare, managing her person and affairs without assistance, until May of 1968. In mid-April of that year, her long-standing request for a room with a private bath (she had a diuretic problem) was finally granted, and she was taken to a Manhattan hotel by her welfare caseworker. She and her caseworker were led to a shabby room in the rear of the hotel, with no light or view. She protested, and was shown

a much nicer room, in the front of the hotel, which she and her caseworker accepted. The rent was paid for the remainder of April, and respondent lived there, without incident, until May 2, 1968. On that day, her attempt to pay the rent for the month of May was refused, the hotel claiming, for the first time, that the room she was in was for "transients, not for permanents." Respondent refused to move to the rear room she and her caseworker had initially declined, and locked herself in her room. The management called the police and within hours police officers broke through her door and took her directly to Bellevue Psychiatric Hospital where she was admitted under section 78 of the New York Mental Hygiene Law as an "emergency" patient. At Bellevue she was examined for less than a minute by a psychiatrist, who attempted to take her blood pressure. She refused, telling him she was a Christian Scientist, and he left the room. She was then taken to a ward where, over her express religious objection, she was forcibly subjected to an intramuscular injection of Thorazine, a tranquilizing medication, before she was examined by any other psychiatrist. On May 6th, although she had not, in fact, been examined by any doctor, she was notified that she had been examined by two doctors and found by them to be mentally ill. On May 7th, the two doctors did examine her, and certified that in their opinion she was mentally ill—a characterization which respondent vigorously disputes. On May 13th, pursuant to their certificate, respondent was transferred to Central Islip, a state mental hospital, where she remained as an involuntary patient until June 18, 1968. On that date, she was converted to "voluntary" status, and on July 18, 1968, she was discharged to her own custody.

The Central Islip "mental status" report described respondent's orientation, memory, retention and recall, knowledge, and abstraction ability as "good," and her "judgment" as "normal" (Appendix to the Second Circuit, pp. 48a-51a). And yet, for the eleven weeks she was hospitalized at Bellevue and Central Islip, including her final month as a voluntary patient, she was forced daily to take medication, orally or by injection, over her express religious objection, even though those medications were not necessary to preserve her life or safety, and even though she was not a behavior or management problem. The doctors and hospital officials, including petitioners, did not obtain or attempt to obtain judicial authorization for their actions.

Following discharge, respondent filed suit under 42 U.S.C. §1983 seeking declaratory and injunctive relief, and damages. The District Court granted summary judgment for petitioners. The Second Circuit reversed and remanded for trial.[1]

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[1] Although she did not, in the present case, challenge the constitutionality of the statutory procedures under which she was hospitalized, respondent advised the courts below that she had intervened as a plaintiff in the case of *Fhagen* v. *Miller*, 306 F. Supp. 634 (S.D.N.Y. 1969), in which Judge Edward Weinfeld ruled that those procedures raised substantial constitutional questions. A three-judge court was convened, but it abstained, and that case is now pending on appeal in the New York State Court of Appeals.

ARGUMENT

I.

The decision of the Second Circuit is limited to the facts of this case, is not in conflict with the applicable decisions of this Court, and is not of sufficient nationwide importance to justify review.

A. The Decision of the Second Circuit Is Limited to the Facts of This Case.

The decision of the Second Circuit is not at all "radical" (State Petition, p. 5), and is much more limited than petitioners would have this Court believe. In her briefs to the Second Circuit, respondent contended "only that *in the circumstances of this case,* compulsory medication constituted an unjustified abridgement of her religious freedom" (*Brief for Plaintiff-Appellant, p. 15*). Apparently believing the case-by-case method to be the best method for resolving the complicated issues in this previously unlitigated area of the law, the Second Circuit declined "to formulate any *per se* rules," and expressly indicated that its decision was limited to "the facts" of this "particular case" (State Petition, p. 7a).

Petitioners do not claim the Second Circuit adopted an incorrect rule of law, or misconstrued the legal principles to be applied in religious freedom cases. Petitioners agree that religious freedom can be abridged only "where there is a strong and compelling state interest" (State Petition, p. 5), which is the standard adopted by both the District Court (State Petition, pp. 37a and 42a), and the Circuit

Court (State Petition, pp. 7a-8a). Petitioners' quarrel, therefore, is not with the legal standard adopted by the Second Circuit, but with the application of that legal standard to the particular facts of this case.

B. The Decision of the Second Circuit Is Not in Conflict With Applicable Decisions of This Court.

Petitioners Miller and O'Neill contend that the decision below "is a radical and unwarranted departure" from the "long-standing principle" that "limitations on the free exercise of religion are justifiable where there is a strong and compelling state interest" (State Petition, p. 5). Petitioner Thomas contends that the decision below is "essentially inconsistent" with *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) (City Petition, p. 7). Even if correct, those contentions would not establish a direct "conflict" with applicable decisions of this Court within the meaning of Rule 19(1) (b) of the Rules of this Court. *E.g.,* Stern & Gressman, *Supreme Court Practice* (4th ed., 1969), pp. 158-159. Furthermore, those contentions are not correct.

Several "principles" emerge from the prior decisions of this Court. Religious freedom is a "preferred" freedom, *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943), which can be abridged "only to prevent grave and immediate danger," *Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943), to a "compelling state interest," *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). And even then, the state must affirmatively show that the state interest cannot be achieved by less drastic alternatives. *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963). See also, *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

1. *Preferred Freedom*

Respondent's religious objection to medication was not accorded "preferred" status. It was simply ignored, exactly as if it had been a non-religious objection.

2. *Grave and Immediate Danger*

The administration of tranquilizing medication was not necessary to prevent grave and immediate danger to respondent. Her life was not in jeopardy, and the only "danger" of withholding medication was that she might be somewhat more vociferous in protesting her involuntary hospitalization than she would be if drugged. Nor was there grave and immediate danger to the state. Even upon admission, respondent was, though protesting, "in no acute distress" (State Petition, p. 26a). She was "not a discipline problem" (State Petition, p. 27a), and there is absolutely no evidence, or even claim, that she had injured, or threatened to injure, the other patients, or the staff.

But even if there had been, at the outset, an "emergency" which justified petitioners in doing what *they* thought best for respondent, surely at some point during respondent's eleven weeks of hospitalization, petitioners could have found the time to request judicial authorization for their continuing disregard of respondent's religious objection to medication. Although challenged in the District and Circuit courts to do so, petitioners have not been able to cite one case which, absent a life or death emergency, authorized involuntary medical treatment without prior judicial approval.

3. *Compelling State Interest*

The only state interest urged by petitioners is the state's interest in restoring the mentally ill to mental health, thus

relieving the state of "burden and expense" (State Petition, p. 7). In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court ruled that "burden and expense" is not a sufficiently compelling state interest to justify abridgment of religious freedom, at least where there are less drastic alternatives (see discussion *infra*).[2]

Of course, petitioners could simply have discharged respondent, thus avoiding any burden or expense. Certainly they could have done so during the final month of her hospitalization, when she was a "voluntary" patient and thus presumed capable of deciding whether she should remain in the hospital.[3] Furthermore, on June 29, 1968, almost three weeks before respondent's discharge, petitioner O'Neill informed the Welfare Department that respondent "has been approved for release from this hospital on convalescent care in her own custody" (Appendix to the Second Circuit, p. 63a). And yet, on that day,

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[2] See also, *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), *vacated and remanded*, 375 U.S. 14 (1963), *on remand*, 125 N.W. 2d 588 (1963). And *State* v. *Yoder*, 49 Wisc. 2d 430, 182 N.W. 2d 539 (1971). And see, *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970), both ruling that increased public expense does not justify abridgment of important constitutional rights.

[3] According to respondent's uncontradicted affidavit, "At Central Islip I was told that unless I agreed to stay as a voluntary patient, I would be held as an involuntary patient for at least six months. It is for that reason, and that reason alone, that I finally agreed to stay as a 'voluntary patient'" (Appendix to Second Circuit, p. 40a). Thus, her status was not truly "voluntary." Still, under N.Y. Mental Hygiene Law §71(5), by converting her to voluntary status, petitioners were certifying that she was "suitable" for voluntary status, which means she was capable of determining, on her own, whether to accept or reject hospitalization. Having signed in as a "voluntary," however, respondent was not free to leave the hospital, unless petitioners consented, for at least 25 days. N.Y. Mental Hgyiene Law §71(1).

and every day thereafter, long after the supposed state interest had been achieved, respondent was forced to accept medication, over her continuing protests, even though petitioners themselves believed her well enough to leave.

Finally, the Second Circuit found there was "no evidence in the record that . . . the state was in any way protecting the interest of society or even any third party" (State Petition, p. 9a), and petitioners suggest no reason for this Court to review that finding of fact.

4. *Less Drastic Alternatives*

Respondent did not object to non-physical treatments such as group therapy, individual psychotherapy or psychoanalysis, occupational therapy, recreational therapy, or the like. Petitioners have never even claimed, much less proved, that one or more of those alternatives would not have sufficed to cure respondent's alleged mental illness. Accordingly, their actions were unconstitutional. *E.g.*, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963); *Covington* v. *Harris,* 419 F.2d 617 (D.C. Cir. 1969); and *Lake* v. *Cameron,* 364 F.2d 657 (D.C. Cir. 1966).

With these principles in mind, it is apparent that there is no conflict between the decision below and the applicable decisions of this Court. *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944); *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905), and *Reynolds* v. *United States,* 98 U.S. 145 (1878), have all been specifically limited by this Court to situations involving "conduct or action" which "invariably posed some substantial threat to public safety, peace or order." *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). And the absence of a life or death emergency

distinguishes this case from *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1007 (D.C. Cir.), *reh. den.*, 311 F.2d 1010, *cert. den.*, 377 U.S. 978 (1964).

C. The Decision of the Second Circuit Is Not of Sufficient Nation-Wide Importance to Justify Review.[4]

Petitioners contend that "the decision below if allowed to stand, would wreak havoc with the methods of care and treatment of mentally ill citizens which are presently utilized throughout the United States today" (State Petition, p. 8). It is difficult to see how that could be so.

In the United States in 1967, approximately 600,000 mental patients resided in 1142 psychiatric facilities.[5] Given that enormous number of patients, it is inconceivable that the number of hospitalized Christian Scientists could ever be large enough in relation to the total to cause concern, much less administrative chaos. And respondent knows of no class of persons, other than Christian Scientists, who could claim the protections of the decision below. Jehovah's Witnesses, for example, object to blood transfusions, on religious grounds, but not to medication, surgery, or other medical treatments. Accordingly, the decision of the Second Circuit, even if followed in every other circuit, could not conceivably cause wide-spread havoc.

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[4] That this issue has never been raised in any other state or federal court, indicates, of itself, that it is not an issue of nation-wide and recurring importance.

[5] New York Times Encyclopedia Almanac, 1970, p. 515.

Furthermore, at least eight states[6] have already, by statute, granted mental patients who believe in healing by prayer, rights equal to, or greater than, those recognized by the decision below. Missouri, which is typical, provides that "no person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone for healing," may be involuntarily hospitalized unless a "court" finds "substantial evidence" that the person "is or would likely become dangerous to himself, or to the person or property of others." Vernon's Ann. Mo. Stat., §202.807(7) (Supp. 1970).[7] Even if such persons are "dangerous" and can therefore be hospitalized, the statute provides that the hospitalization provisions "do not authorize any form of compulsory medical treatment" (*id.*).[8] At least two more states have statutes which, though more ambiguous, expressly protect religious freedom for mental patients, including, arguably, the freedom to refuse medication.[9] And there may be other states which, by regulation, have respected the patient's right to refuse medication on religious grounds. Respondent knows of no state which, by statute or regulation, expressly authorizes forced medication of a mental patient who objects on religious grounds. In these circumstances, it cannot be said that the

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[6] California, Idaho, Kansas, Michigan, Missouri, New Jersey, North Dakota, and Vermont.

[7] See also, to the same effect, Kan. Stat. Ann. §59-2902 (Supp. 1970); Cal. Welfare & Inst'ns. Code, §6300.1 (Supp. 1971); Mich. Comp. Laws, §330.19 (Supp. 1971); Idaho Code Ann. §66-329(j) (Supp. 1969); N.D. Cent. Code §25-03-11(7) (Supp. 1971); and Vt. Stat. Ann., Title 18, §7507 (1968).

[8] See also, to the same effect, N.J. Stat. Ann. §30:4-7.6 (Supp. 1971); Cal. Welfare & Inst'ns. Code, §7104 (Supp. 1971).

[9] *E.g.*, Minn. Stat. Ann. §253A.17(6) (1971); and Pa. Stat. Ann., Title 50, §4423(2) (1969).

decision below is of such general concern as to justify review by this Court.

II.

This Court should not consider the applicability of the doctrine of *respondeat superior* to the facts of this case because that question is premature, and was not raised, briefed or argued in either of the Courts below.

Respondent expects to prove at trial that petitioners either directed the acts of which she complains, or had knowledge of those acts and did nothing to prevent them, thus making it unnecessary to decide whether, absent such proof, petitioners could be held liable in damages on a *respondeat superior* theory. That proof, of course, is not before this Court. Petitioners have not yet answered the complaint and respondent has not yet taken depositions or propounded interrogatories. Petitioners did submit affidavits in support of their motions to dismiss, but those affidavits do not claim that petitioners had no personal knowledge of the acts complained of herein. And even from the present undeveloped record, it is evident that one of the petitioners, at least, did have personal knowledge. On June 29, 1968, almost three weeks before respondent was discharged, petitioner O'Neill wrote a letter to the Welfare Department in which he acknowledged that "being a Christian Scientist, medication is against her [respondent's] religious practices" (Appendix to the Second Circuit, pp. 63a-66a). But the medication continued (State Petition, p. 25a).

For the remainder of this point, however, it will be assumed that one or more of the petitioners would be

liable, if at all, only if the doctrine of *respondeat superior* is applicable to the facts of this case. That is a question which was not raised, briefed or argued in either of the courts below, and was referred to for the first time in the dissenting opinion of Judge Moore (State Petition, pp. 14a-15a).

In the District Court, petitioners filed two separate motions to dismiss the complaint. In the memorandum supporting his motion, petitioner Thomas contended only that this was not a proper class action (Point I) and that Thomas was "immune" from suit because he was "an intricate part of the municipality" (Point II). In their memorandum, petitioners Miller and O'Neill contended only that the action was "moot" (Point I), that the District Court should abstain (Point II), that the treatment administered to respondent "was not a constitutional violation" (Point III), that the hospitalization procedures were constitutional (Point IV), and that fingerprinting and photographing of mental patients was constitutional (Point V). In a reply memorandum, petitioners Miller and O'Neill agreed with petitioner Thomas that the action was moot.[10] It is not surprising, therefore, that the District Court said nothing at all about *respondeat superior* or vicarious liability. Nowhere in the briefs to the Circuit Court was there any reference to the issue petitioners now ask this Court to review. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 note 16 (1958). See

[10] In a letter to the District Court dated October 30, 1969, Assistant Attorney General Joel H. Sachs did state, without citation or elaboration: "As regards plaintiff's claim for damages, such claim, if sustainable, can only be filed in the Court of Claims of the State of New York."

also, to the same effect, *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 note 2 (1970); *Husty* v. *United States,* 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927); and the numerous cases cited in the *United States Supreme Court Digest,* Appeal and Error, §1104. Where, as here, the issue is premature and may be academic, and where, as here, the petitioners can raise that issue, if it becomes relevant or necessary, in the trial court, and later on appeal, there is no need, or even justification, for departing from this Court's long-standing rule.

Finally, it must be admitted that the applicability of the doctrine of *respondeat superior* in §1983 cases is, indeed, an important question, and one that should not be resolved on the basis of the inadequate record now before this Court. Without attempting fully to brief that issue on the merits, it can be noted that there are strong indications in the decisions of this and other federal courts that the doctrine does apply in §1983 cases.

In *Adickes* v. *Kress & Co.,* 398 U.S. 144 (1970), the plaintiff alleged that employees of a Kress restaurant refused to serve her, a white teacher, because she was accompanied by six black students. She brought suit under §1983, but not against the employees. Rather, she sued only Kress, the corporation, which would be liable, if at all, only on a *respondeat superior* theory. The majority of this Court, although remanding for trial, expressly declined to consider "the relief that might be appropriate," the "remedial issues," and "whether there are any defenses available to defendants in §1983 actions like the one at hand" (398 U.S. at 174 note 44). Thus, the question is at least open, and it would seem implicit in the majority's decision that

the teacher's attempt to impose vicarious liability on Kress was certainly not frivolous and might well be authorized under §1983. Mr. Justice Brennan would have gone further. In a separate opinion, he considered "the kinds of relief" which might be available in §1983 cases (398 U.S. at 231-234), pointing out that "[p]roof of an evil motive of a specific intent to deprive a person of a constitutional right is generally not required under §1983" (398 U.S. at 232). And it is not even necessary that the defendant be shown to have actual knowledge of the violation if he "acted with reckless disregard" (398 U.S. at 233). Mr. Justice Brennan stressed that §1983 "was enacted by a Congress determined to stamp out widespread violations of constitutional rights at virtually any cost, and which imposed liability even on persons who simply failed to prevent certain violations" (398 U.S. at 234).[11]

And in *Nesmith* v. *Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. den. sub nom. Sullivan* v. *Nesmith*, 375 U.S. 975 (1964), the court ruled, in a §1983 case, that "civil liability for money damages of the respective Defendants would depend on traditional tort principles. Each such action will have to be brought home to each Defendant or imputed to him constructively. . . . showing personal action or that imputed by conspiracy, agency, partnership, *respondeat superior*, or the like" (318 F.2d at 125-126) (emphasis added).

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[11] See also, *Roberts* v. *Williams*, —— F.2d —— (5th Cir. 1971), 39 U.S.L.W. 2590, in which the court upheld a §1983 damage action against a prison warden who, through "callous indifference . . . at the management level, in the sustained knowing maintenance of bad practices and customs" permitted an untrained "trusty guard" to carry a shotgun, which was negligently discharged to the injury of the plaintiff.

Given the importance of this question, it should not be resolved on the basis of an incomplete record, particularly where, as here, the named defendants may well be found to be personally liable, thus making it unnecessary even to consider the applicability of the doctrine of *respondeat superior* in a §1983 action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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